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NO. _____

IN THE
SUPREME COURT OF THE
UNITED STATES

October Term, 1982

CAPITOL AGGREGATES, INC.,

Petitioner

vs.

RAYMOND J. DONOVAN, SECRETARY
OF LABOR, AND FEDERAL MINE
SAFETY AND HEALTH REVIEW COMMISSION,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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ATTORNEYS FOR PETITIONER

QUESTIONS PRESENTED FOR REVIEW

1. Did Congress intend in §801(f) of the Federal Mine Safety and Health Act ("the Act") to declare that all mines affect commerce as a class of activity, and thereby relieve the Respondent Secretary of Labor ("the Secretary") of the burden of proving that the products or operations of a mine affect commerce within the meaning of §803 of the Act?

2. If Congress intended §801(f) to declare that all mines affect commerce as a class of activity, and to thus declare jurisdiction to exist as a matter of law over all mines, then did Congress have a rational basis for declaring jurisdiction over surface quarries?

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DESIGNATION OF CORPORATE RELATIONSHIPS

Pursuant to Supreme Court Rule 28.1, CAPITOL AGGREGATES, INC., filing this PETITION FOR WRIT OF CERTIORARI as Petitioner in this proceeding, states that:

This is its original Designation of Corporate Relationships.

H. B. Zachry Company is the parent company of Capitol Aggregates, Inc.

Capitol Aggregates, Inc. does not have an ownership interest in any subsidiaries.

The affiliates of Capitol Aggregates, Inc. are:

1. Bexar Equipment Company
2. Bexar Exporting, Inc.
3. Canyon Creek Railway, Inc.
4. Capitol Aggregates, Inc.
5. Concrete Development Corporation
6. Construction Modules, Inc.
7. Francitas Gas Company
8. Metropolitan General Hospital, Inc.
9. Metropolitan Medical Center, Inc.
10. Metropolitan Professional Building, Inc.
11. Navarro Auto Park, Inc.
12. Palacio Del Rio, Inc.
13. Pecos Valley Southern Railway, Inc.
14. Pecos Valley Southern Transport Company
15. Southern Pecan Land, Inc.
16. Telpole Company
17. Tower Data, Inc.
18. Tower Ventures, Inc.
19. Trans-Pecos Materials, Inc.
20. Vista Verde Company (dormant)
21. H. B. Zachry Company (Caribbean) (formerly H. B. Zachry Company of Puerto Rico)
22. H. B. Zachry Company (International) (formerly Zachry International Puerto Rico)
23. H. B. Zachry Company (Overseas)
24. Zachry Construction Ltd. (Canadian Corporation)
25. Zachry de Mexico SA de CV Constructora (dormant)
26. The Zachry Foundation

27. H. B. Zachry Foundation for Research and Education
28. Zachry, Inc.
29. Zachry Industries, Inc.
30. Zachry International, Inc.
31. Zachry Mining Company
32. Zachry Overseas Construction Ltd. (United Kingdom Corporation)
33. Zachry of San Antonio, Inc.
34. Zachry Saudi Arabian Contracting Co. Ltd.
35. Zachry of Texas, Inc.
36. Zachry of Thailand, Inc. (dormant)

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

STATEMENT REGARDING OPINIONS BELOW

The decision of the Administrative Law Judge (ALJ) (App. A, infra, pp. A1 - A16) is reported at 1980 OSHD ¶24,589 (1980). The decision of the Federal Mine Safety and Health Review Commission (App. A, infra, pp. A17 - A27) is reported at 1980 OSHD ¶25,550; 2 FMSHRC 1040 (1981). The opinion of the United States Court of Appeals for the Fifth Circuit is unreported (App. A, infra, pg. A28).

JURISDICTIONAL GROUNDS IN THIS COURT

The opinion of the United States Court of Appeals for the Fifth Circuit was entered on March 19, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) (1966).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. U. S. CONST.art. 1, §8, cl. 3.

> [The Congress shall have Power...]
> to regulate Commerce with Foreign Nations, and among the several States, and with the Indian Tribes;
> ... .

2. 30 U.S.C. §801(f)

> [Congress declares that ...]
>
> (f) the disruption of production and the loss of income to operators and miners as a result of coal or other mine accidents or occupationally caused

diseases unduly impedes and burdens commerce;...

3. 30 U.S.C. §802(b)

(b) 'commerce' means trade, traffic, commerce, transportation, or communication among the several States, or between a place in a State and any place outside thereof, or within the District of Columbia or a possession of the United States, or between points in the same State but through a point outside thereof;

4. 30 U.S.C. §803

Each coal or other mine, the products of which enter commerce, or

the operations or products of which affect commerce, and each operator of such mine, and every miner in such mine shall be subject to the provisions of this chapter.

STATEMENT OF THE CASE

Petitioner, CAPITOL AGGREGATES, INC., is a corporation primarily engaged in the manufacture of bulk cement and ready-mix concrete, and the quarrying of limestone, sand and gravel in the State of Texas. Petitioner mines limestone from a quarry in San Antonio, Texas. Petitioner also mines sand and gravel from a quarry in Austin, Texas. Petitioner's products are not sold outside the State of Texas.

In May, 1978, the quarries were inspected by Mine Safety and Health Administration (MSHA) Inspectors. As a result of these inspections, several citations were issued to Petitioner, alleging violations of the Mine Safety and Health Act, 30 U.S.C. §801, et. seq. (Supp. 1977), hereinafter referred to as "the Act". Petitioner contested each of the citations, which were heard by the Honorable Charles C. Moore, Jr., Administrative Law Judge ("ALJ") in two separate hearings.

Petitioner specifically objected to the jurisdiction of the Federal Mine Safety and Health Review Commission ("the Commission") because Petitioner's products do not enter commerce, and Petitioner's products and operations do not otherwise affect

commerce. Petitioner does not sell its products beyond a 200 mile radius of its quarry operations in San Antonio and Austin, Texas. On August 27, 1980, the ALJ ruled solely on the basis of evidence that Petitioner sold its mine products intrastate that Petitioner was subject to the Commission's jurisdiction under the Act and upheld violations alleged in some of the citations. (Several of the citations were settled as to the facts and penalty, subject to a final determination of Petitioner's jurisdictional objection.) The issue of federal jurisdiction was timely raised by Petitioner before the case was submitted to the ALJ and has continuously been raised on appeal.

Petitioner submitted to the Commission a Petition for Review of the

ALJ's decison. The Commission affirmed the ruling that jurisdiction existed.

The Petitioner timely submitted to the United States Court of Appeals for the Fifth Circuit a Petition for Review pursuant to the Act, 30 U.S.C. §816 (1971). After oral argument of the case, the Fifth Circuit affirmed the Commission's decision.

Because a substantial federal question is involved regarding federal jurisdiction over a wholly intrastate mine operator, the Petitioner submitted this Petition for Writ of Certiorari pursuant to 28 U.S.C. §1254(1).

REASONS FOR GRANTING THE WRIT

1. Congress did not intend by §801(f) of the Act to declare jurisdiction to exist over all mines as a class

of activity, thereby relieving the Secretary of the burden of proving that Petitioner's mine products or operations affected commerce within the meaning of §803 of the Act.

Congressional authority to regulate Petitioner's activities under the Act is derived from the interstate commerce clause of the Constitution of the United States (U.S. CONST. art. 1, §8, cl. 3) which provides Congress may regulate commerce among the several states. Petitioner is not subject to jurisdiction under the Act because: (1) Petitioner's products do not enter interstate commerce, (2) Petitioner's products have not been shown by any substantial evidence to affect commerce, and (3) Petitioner's mine operations have not been shown by any substantial

evidence to affect interstate commerce.

Congress has specifically defined a category of mines which are subject to the Act:

> "Each coal or other mine, the products of which enter commerce, or the operations or products of which affect commerce, and each operator of such mine, and every miner in such mine shall be subject to the provisions of this Act."
> 30 U.S.C. §803 (Supp. 1977)

The term "commerce" as used in the Act is defined to mean commercial intercourse between states:

> "For the purposes of this Act, the term...
>
> (b) 'commerce' means trade, traffic, commerce, transportation, or communication among the several states, or between a place in a state and any place outside thereof, or within the District of Columbia or a possession of the United States, or between points in the same state but through a point outside thereof;..."

30 U.S.C. §802(b) (1977)

Clearly, §802(b) and §803 show that Congress contemplated some mines might not engage in or otherwise affect interstate commerce, and therefore should not be subject to the Act. Thus, Congress obviously did not intend to cover within its jurisdiction any mine which was not subject to the Act under §803. Accordingly, Congress could not have intended to relieve the Secretary of his burden of proving jurisdiction under §803 when an objection to the jurisdiction is raised.

2. Jurisdiction Can Not Be Exercised Over Petitioner Under a"Class of Activities" Theory Because There Was No Rational Basis for Congress' Declaration of Jurisdiction in §801(f) of the Act.

The record below contains no evidence that Petitioner's quarry operations or products affect commerce. The only relevant fact in evidence was that Petitioner sells its products intrastate. [ALJ Decision, Appendix pp. A-3,4.] Therefore, the Secretary has relied upon the "class of activities" theory as applied to §801(f) of the Act. Petitioner believes this theory does not support the Secretary's case.

The "class of activities theory" involves the broadest exercise of the commerce power available to Congress. This theory, in the opinion of the Secretary, holds that Congress may simply declare an activity to affect commerce [as in §801(f) of the Act] and thereby conclusively establish juris-

diction over every member of the class, even if a member operates only intrastate and does not actually affect commerce. Stated another way, the Secretary would insist that jurisdiction exists as a matter of law under §801(f) of the Act, and therefore no proof of an affect on commerce was necessary to acquire jurisdiction over Petitioner.

However, the Court has consistently ruled that such a declaration can be properly made only where a rational basis for such a declaration is clearly supported by the congressional record. [Cases cited infra.] If Congress were not required to find and document a rational basis for declaring the existence of an affect on commerce, it could assume jurisdiction over any activity at will, a power clearly beyond

the confines of the commerce clause of the Constitution (U. S. CONST., art. 1, §8, cl. 3).

The ALJ relied upon the "class of activities" rationale as applied in Marshall v. Bosack, 463 F. Supp. 800 (E.D. Penn. 1978); Heart of Atlanta Motel, Inc., supra; Fry, supra; Katzenbach v. McClung, 379 U.S. 294, 85 S. Ct. 377, 13 L. Ed. 2d 290 (1964); United States v. Darby; 312 U.S. 100 61 S. Ct. 451, 85 L. Ed. 609 (1940); Perez v. United States, 402 U.S. 146, 91 S. Ct. 1357, 28 L. Ed. 686 (1971). These cases involved a variety of nationwide regulatory schemes. Each of the cases have upheld jurisdiction to regulate a class of activities because the Court, after reference to the congressional record, found documented evidence that it was

reasonable for Congress to declare that a class of activity affects or impedes commerce. See Perez, Heart of Atlanta, Katzenbach, Darby, all supra; see also Usery v. Lacy, 628 F.2d 1286, 1229 (9th Cir. 1980).

The "mere fact that Congress has said when a particular activity shall be deemed to affect commerce does not preclude further examination...". Katzenbach, supra, 379 U.S. at p. 303. Such an examination involves a judicial determination of whether Congress had a rational basis for broadly declaring that the regulated activity affects commerce. Perez, supra; United States v. Vignola, 464 F.Supp. 1091, 1098 (E.D. Penn. 1979). To be a reasonable exercise of Federal jurisdiction over class members who do not individually affect

commerce, Congress must clearly demonstrate that the activity sought to be regulated necessarily has an impact on the regulation of interstate commerce that justifies the imposition of Federal regulation:

> "The activities that are beyond the reach of Congress are 'those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purposes of executing some of the general powers of the government.' Gibbons v. Ogden, 9 Wheat. 1, 195, 6 L.Ed. 23 (1824). This rule is as good today as it was when Chief Justice Marshall laid it down almost a century and a half ago."
> Katzenbach, supra, 379 U.S. at 304.

In the case of the Mine Safety and Health Act, close examination of the congressional record shows there was no

rational basis for asserting jurisdiction over surface quarry operations under §801(f).

The 1977 Act basically only amended the Federal Coal Mine Safety and Health Act of 1969 to apply to "other" mines, and repealled the provisions of the Federal Metal and Nonmetallic Mine Safety Act of 1966 ("Metal Act"), which theretofore had regulated surface mines. See U. S. Code Cong. & Admin. News, 95th Cong., 1st Sess., p. 3401, et. seq. (1977). The intent of Congress was to extend the regulation of the hazardous coal mining industry to all mining activities. Joint Explanatory Statement of the Committee of Conference, House Conf. Rep. 95-655, 95th Cong. 1st Sess. (1977), reprinted in U. S. Code Cong. & Admin. News, p. 3485. In fact, the

declaration in §801(f) of the current Act is the same declaration used in the Coal Mine Safety and Health Act of 1969, 30 U.S.C. §801, et seq. (1969), repealled, 30 U.S.C. §801 et seq. (Supp. 1977), with the sole exception of the modified reference to "other" mines.

Regardless of whether Petitioner may have had a burden to show the absence of any rational basis for the jurisdictional declaration in §801(f) of the Act, a review of the legislative history of both the 1977 Act and the 1966 Metal Act clearly illustrates on its face that Congress did not have a rational basis to summarily extend jurisdiction to regulate all surface quarries within the class of mines.

Noting that an injury rate of "19.61" was "well above average", a 1966

Senate committee report showed quarries had the lowest injury frequency rate (which was well below average), after underground coal, mining, underground non-coal mining, construction, lumber, air transport, leather, and transit. S. Rep. No. 1296, 89th Cong., 2nd Sess. (1966), reprinted in U.S. Code Cong. & Admin. News, at 2847.

The repealled Metal Act also required the Secretary to record "violations reported and safety practices in the sand and gravel industry." See S. Rep. No. 1296, 89th Cong., 2d Sess. (1966), reprinted in U.S. Code Cong. & Admin. News, at 2852. Despite this significant data collection requirement, nowhere in the legislative history of the 1977 Act does it indicate that Congress may have relied on or even

referred to such reports in extending jurisdiction to all surface mines.

The reported views of Senators Paul Fannin, Jacob Javitz and Peter Dominick during consideration of the 1966 Metal Act reflect their objections that certain mining operations should not be regulated by Congress. Senator Fannin stated:

> "Because of the nature of the operations in the gravel and sand industry, therefore, it would be inappropriate to include the industry under a Federal law which is designed to regulate safety in the mining industry. It is best regulated by existing State and local codes applicable to manufacturing and construction operations which contain hazards similar to those encountered in the gravel and sand industry."

See S. Rep. No. 1296, 89th Cong., 2d Sess. (1966), reprinted in U.S. Code Cong. & Admin. News, at 2874.

Recognizing the generally small size of sand and gravel operations, Senator Fannin emphasized that the sand and gravel industry did not have the same hazards as the coal industry:

> "In the sand and gravel industry there are approximately 6,000 plants located in the United States which produce commercial sand and gravel. Almost 60 percent of these plants produce less than 50,000 tons of material per year. The average plant employs only seven men, and many of these operations employ only one or two men. In other words, in the sand and gravel industry, there are no large individual plants in terms of personnel exposed to catastrophic hazards."

See S. Rep. No. 1296, 89th Cong., 2d Sess. (1966), reprinted in U.S. Code Cong. & Admin. News at 2874.

Lacking any rational basis for extending jurisdiction to surface quarries, Congress attempted to overcome this obstacle by leaving the exercise of jurisdiction under the 1966 Metal Act to the discretion of the Secretary of the Interior.[1]

---

[1]The applicable provision of the Metal Act was §722(b), now repealled which read "(b) The Secretary may, by published rules adopted pursuant to the Administrative Procedure Act, decline to assert jurisdiction under this chapter over any class or category of mines where, in the opinion of the Secretary, the effect of the operations of such mines on commerce is not sufficiently substantial to warrant the exercise of jurisdiction under this chapter, and the record of injuries and accidents in such class or category of mines warrants such a declination of jurisdiction."

> "... many sand and gravel pits and comparable crushed stone operations operate for a short period of time, often with respect to a particular job such as highway construction. In these situations, the the Secretary is expected to consider carefully whether his authority to decline jurisdiction should be exercised. He would be expected to exercise his authority to decline jurisdiction if the safety experience warranted it. The Committee would expect the Secretary to give controlling weight to the evidence of hazard in such operations in determining whether jurisdiction should be exercised." S. Rep. No. 1296, Id. at p. 2851-2852.

The legislative history of the Metal Act further demonstrates that Congress' true concern was for safety in underground mines, since it required mandatory inspections only of underground mines. Id. at 2851-52. The Senate subcommittee

which reviewed the legislative proposal for regulation of metal and nonmetallic mines determined:

> "The requirement of annual or more frequent inspections of underground mines is in recognition of the fact that underground mining operations are decidedly the most hazardous of the various operations within the scope of the proposed act..."
> S. Rep. No. 1296, Id. at p. 2851 and 2852.

It is obvious from the congressional record of the 1977 Act that, in declaring that all mining activities affect commerce, Congress acted at best out of absolute uncertainty as to whether non-coal, surface mines presented a sufficient impact on interstate commerce to be regulated as a part of the class of mining activities without requiring specific proof of an affect on

commerce. The record shows Congress' main concern again was the regulation of hazardous coal mines.

The Senate committee report on the 1977 Act contains a chart which was showed the incidence of injuries in the mining industry. See U.S. Code Cong. & Admin. News, 95th Cong., 1st Sess., p. 3406-7 (1977). The chart only has statistics for coal and metal/non-metal mining injuries and fails to break down the non-metal categories to reflect statistics on stone quarries and sand and gravel operations. See U.S. Code Cong. & Admin. News, 95th Cong., 1st Sess., p. 3407 (1977).

The legislative history of the 1977 Act shows that Senator Orrin Hatch, objected to extension of the coal mining statute to all non-coal mines, arguing

that mining disasters prevalent in the coal mining industry do not exist in the non-coal mining industry. See U. S. Code & Cong. Admin. News, 95th Cong., 1st Sess. at p. 3480 (1977). Yet, Congress by its declaration placed the non-coal, surface mining industry under its jurisdiction without establishing the particular need for regulating this segment of the mining industry.

The dissent of Judge Kelleher in Usery v. Lacy, supra, appropriately echoes CAPITOL'S position:

> "... the majority's novel assertion that the nature and breadth of the Constitution's limitations upon the exercise of congressional power are determined by congressional intent in the exercise of such power finds no support in constitutional history. If the majority's assertion were indeed true, the entire constitutional

> basis of judicial review of congressional authority to enact statutes within the confines of its constitutionally-delimited power would evaporate." Id., 628 F.2d at 1231.

3. Capitol's Wholly Intrastate Sales of Mine Products Cannot be Deemed to Affect Interstate Commerce so as to Subject Capitol to the Act under the theory of Wickard v. Filburn.

Since the Secretary cannot rely on the class of activities theory to avoid his burden of proving Petitioner's mine operations or products affect commerce, the Secretary has relied upon the theory of Wickard v. Filburn, 317 U.S. 111,63 S. Ct. 82,87 L.Ed. 122 (1942), to establish jurisdiction on the basis of the only relevant fact in evidence - that Petitioner has sold its mine products intrastate.

In Wickard, jurisdiction to regulate intrastate wheat sales was upheld under the theory that intrastate production and consumption of wheat supplanted sales of wheat from outside the state, directly interfering with the legitimate legislative purpose of controlling the wheat market through exercise of the commerce power. Id., 317 U.S. at p. 127.

In Marshall v. Kilgore, 478 F. Supp. 4 (E.D. Tenn., S.D. 1979), a district court also held intrastate sales of coal satisfied a market demand that could have otherwise been supplied by out of state coal producers, thus sufficiently affecting commerce to warrant the exercise of Federal jurisdiction over a coal mine operator. The rationale of this economic impact theory is found in several other cases. Fry v.

United States 421 U.S. 541, 95 S.Ct. 1792, 44 L.Ed. 2d 363 (1975); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 85 S.Ct. 348, 13 L.Ed. 2d 258 (1964); U.S. v. Wrightwood Dairy Co., 315 U.S. 110, 62 S.Ct. 523, 86 L.Ed. 726 (1942). It is apparent from these cases that Petitioner's activities, to be subject to the Act's jurisdiction, must exert an affect on interstate commerce by reason of interdependence, interaction, or overlapping between the geographical product market areas of Petitioner and out-of-state producers. Without proof of interdependence among interstate markets, interdependence the economic impact theory, does not logically apply to Petitioner.

While coal or wheat may be shipped across great distances, the same

cannot be presumed so for Petitioner's mine products. Petitioner established not only that its sales were purely intrastate, but that its mine-related products (cement, aggregate sand and gravel, and ready-mix concrete), unlike coal or wheat, are too heavy to economically transport in excess of 200 miles from its plants, centrally located within the State of Texas in San Antonio and Austin. (Tr. 228, 229) See Featherstone Concrete Products, Inc., 1980 OSHD 24,861, OSHRC Docket No. 79-4944 (1980). In Featherstone, the administrative law judge found the fact that Featherstone delivered it products "within 300 miles" of San Antonio in a state as large as Texas insufficient evidence of an affect on commerce.

There simply is no evidence that Petitioner's customers would seek cement, aggregate or concrete from out of the State of Texas if Petitioner did not supply its local intrastate market area. On the contrary, there is evidence that other cement producers located in San Antonio would supply local demand for this product from local sources. (Tr. 228)

The ALJ could only speculate that Petitioner's sales satisfied a market demand for cement which would otherwise be satisfied by out-of-state sellers of cement. In the absence of such evidence, Petitioner's intrastate sales cannot be deemed to affect interstate commerce under the rationale of Wickard.

On the basis of the evidence developed at the hearings below, prior to Petitioner's motions to dismiss for lack of evidence to support jurisdiction, there was absolutely no evidence to show that Petitioner's products had any affect on interstate commerce. Therefore, the Secretary simply failed to meet his burden of proof of jurisdiction.

CONCLUSION

Congress did not intend to make all mines subject to the Act by its §801(f) reference to a class affect on commerce. Even if Congress intended to declare jurisdiction over all mines as a matter of law, there is no rational basis for the exercise of jurisdiction over Petitioner's wholly intrastate activities simply because Petitioner operates a surface quarry. There is no substantial evidence that Petitioner's products or operations affect commerce. A substantial federal question has been presented here regarding an extension of the commerce power of the Congress over intrastate activities where there is no rational basis for such extension of power. For these reasons it is,

respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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San Antonio, Texas 78205
(512) 223-4061

By:
Richard L. Reed

ATTORNEYS FOR PETITIONER

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of June, 1982, true and correct copies of the above and foregoing PETITION FOR WRIT OF CERTIORARI to the UNITED STATES COURT OF APPEALS for the FIFTH CIRCUIT have been served upon the Respondents, Secretary of Labor, Mine Safety and Health Review Commission, and upon the Solicitor General, Department of Justice, by certified mail, return receipt requested, addressed to:

Mr. Dennis D. Clark
General Counsel and
Mr. James A. Lastowka
Deputy General Counsel
Office of the General Counsel
FMSHRC
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6th Floor
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and

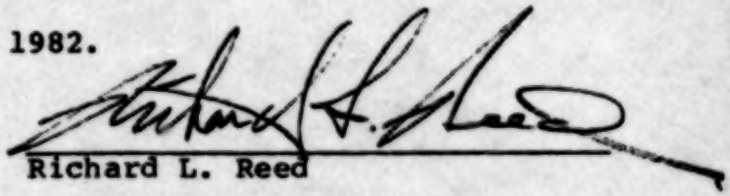
CERTIFICATE OF SERVICE (cont.)

Ms. Nancy Spencer Hyde and
Mr. Michael A. McCord
U. S. Department of Labor
Office of the Solicitor
4015 Wilson Boulevard
Arlington, Virginia 22203

and

The Solicitor General (three copies)
Department of Justice
Washington, D. C. 20530

Pursuant to an extension granted by the Clerk of the Supreme Court, this PETITION FOR WRIT OF CERTIORARI has been revised in conformance with the rules of form of the Supreme Court and is submitted in substitution of the non-conformed Petition earlier filed with the Court on June 17, 1982.



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